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March 16, 1993

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20036

RE: In the Matter of Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules
to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and
Policies for Local Multipoint Distribution Service
CC Docket No. 92-297

Dear Ms. Searcy:

Attached are the original and five copies of the Comments of Sprint in the proceeding
referenced above.

Sincerely,

Jay C. Keithley
Jay C. Keithley

Attachment

JCK/mlm

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
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and Part 21 of the)
Commission's Rules to)
Redesignate the 27.5 - 29.5)
GHz Frequency Band and to)
Establish Rules and Policies)
for Local Multipoint)
Distribution Service)

CC Docket No. 92-297

RM-7872; RM-7722

COMMENTS OF SPRINT

Respectfully submitted,

SPRINT CORPORATION

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March 16, 1993

SUMMARY

Sprint Corporation respectfully comments on the Commission's Notice of Proposed Rulemaking issued January 8, 1993 in CC Docket No. 92-297.

Sprint supports the Commission's proposal to redesignate the 28 GHz band fixed service allocation to Local Multipoint Distribution Service ("LMDS") to provide video and other communications services. Sprint believes the proposal will foster the much needed competition to the existing CATV providers and will encourage the development of new communications services. However, certain modifications to the Commission's proposal must be made.

LMDS licensees should not be allowed to choose between common carrier and private/non-common carrier service. Rather, the Commission should evaluate the nature of the service and the manner in which it is offered and make the determination as to common carrier or private/non-common carrier status accordingly. This determination should be made without regard to the status of the service provider as a LEC.

The service area for LMDS license should not be defined by the Rand McNally BTAs, but by the smaller, cellular MSA/RSAs. Use of this smaller service area will encourage more small, but qualified applicants and help meet the Commission's goal of rapid service deployment.

The Commission's suggested build out requirement of coverage to 90% of the service area population within three years is too restrictive. Sprint suggests using the 75% for MSAs and even less restrictive requirements for RSAs as was adopted in the cellular licensing proceedings.

Sprint agrees with the Commission that LECs should not be prohibited from providing LMDS video services in territory. However, Congress has already decided, in the Cable TV Consumer Protection and Competition Act of 1992, that existing CATV franchisees should be prohibited, in their existing service territory, from providing MDS services and this prohibition should also apply to LMDS services.

Sprint supports the allocation of 2 GHz of spectrum for LMDS and the further allocation of 1 GHz to each of two licensees for each service area. However, Sprint does not believe detailed technical specifications are necessary or even desirable.

Sprint supports the use of random selection to select licensee. However, Sprint believes the Commission's proposed ban on settlements and transfers is too restrictive and unnecessary. At the very least, holders of LMDS licenses should be allowed to trade licenses in certain limited situations.

Finally, Sprint suggests that the license term must be ten years, not five as proposed, and licensees should be granted a reasonable renewal expectancy.

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Establish Rules and Policies)	
for Local Multipoint)	
Distribution Service)	

COMMENTS OF SPRINT

Sprint Corporation ("Sprint"), on behalf of Sprint Communications Company L.P. and the United and Centel Telephone companies,¹ hereby respectfully submits its comments in response to the Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration, FCC 92-538, released January 8, 1993 ("NPRM").

1. Carolina Telephone & Telegraph Co., United Telephone - Southeast, Inc., United Telephone Company of the Carolinas, United Telephone Company of Southcentral Kansas, United Telephone Company of Eastern Kansas, United Telephone Company of Kansas, United Telephone Company of Minnesota, United Telephone Company of Missouri, United Telephone Company of Texas, Inc., United Telephone Company of the West, United Telephone Company of Florida, The United Telephone Company of Pennsylvania, United Telephone Company of New Jersey, Inc., United Telephone Company of the Northwest, United Telephone Company of Ohio, United Telephone Company of Indiana, Inc., Central Telephone Company, Central Telephone Company of Florida, Central Telephone Company of Illinois, Central Telephone Company of Virginia, and Central Telephone Company of Texas.

I. INTRODUCTION

Sprint supports the Commission's proposal to redesignate the 28 GHz band fixed service allocation to Local Multipoint Distribution Service ("LMDS") to provide video services. As the Commission notes: "...such use of the 28 GHz band would provide additional competition to franchised cable companies."² Sprint believes that such additional competition in the video marketplace is desirable and necessary if the public is to fully realize the benefits that video services can provide.

Further, Sprint agrees with the Commission that the 28 GHz band should not be limited to video services, but should be available for any communications use. It is unclear whether existing technology will support other communications services on the 28 GHz band. However, it is appropriate to enact a regulatory framework for the 28 GHz band that provides licensees the flexibility to provide any services within this bandwidth, as technology evolves, tailored to the public's needs and desires.

2. NPRM at par. 16.

II. REGULATORY STATUS OF LICENSEES

The Commission requests comment upon the regulatory status to be afforded to LMDS licensees, the basis upon which selections of regulatory status should be made, and the effects such status selection will have upon consumers. It proposes that LMDS licensees be allowed to choose whether they will operate as a common carrier or non-common carrier on a channel-by-channel and/or cell-by-cell basis. The Commission also seeks comments upon whether the non-video services provided by LMDS licensees should be regulated as common carrier services, and the jurisdictional implications presented if local exchange carriers are allowed to elect non-common carrier status.³

Sprint does not support adoption of a "status election" procedure for LMDS services. Regulatory status should not be established based upon the status election of each individual licensee. Rather, the Commission should evaluate the nature and type of service to be offered, and regulate those services in a like manner with existing equivalent services. The Commission should not require a particular regulatory classification based upon the identity of the licensee, but rather it should establish the regulatory classification based upon the type of service, and how it is offered. If the Commission makes a determination that a service should be regulated in a particular way (common carrier or non-common carrier), the same regulatory classification should

3. NPRM at par. 26.

apply to the service whether or not the service is offered by a local exchange carrier or some other entity. To do otherwise would cause customer confusion and permit disparate competitive impacts on providers of similar services.⁴

Sprint is not suggesting that the Commission should not be flexible in its approach to new services, or to LMDS in particular. The Commission states that its objectives in establishing LMDS for licensing are "to provide consumers with additional options by which to satisfy video and other telecommunications requirements"⁵ and "to provide applicants in this band sufficient flexibility to satisfy consumer demand, expedite service to the public, make more efficient use of

4. Sprint realizes that the Commission previously has allowed licensees to elect between common carrier and non-common carrier status in other radio-based services, including licensees in the Multichannel Multipoint Distribution Service. However, in so doing, the Commission first established guidelines for the type of service to be offered and then provided flexibility as to regulatory status. For example, while Multipoint Distribution Service ("MDS") was originally established as a service to be provided on a common carrier only basis, the Commission eventually found that there was "no reason to compel MDS licensees to be subject to the full panoply of common carrier regulation as a condition of being a Commission licensee." The Commission found that a licensee desiring to "use MDS facilities for its own purposes" (defined as "offering information of the licensee's own design and choosing") was required to choose non-common carrier status. Thus, while it allowed some flexibility on regulatory classification, the Commission nevertheless established some guidelines about what type of service should be offered in what manner. In the Matter of Revision to Part 21 of the Commission's Rules Regarding the Multipoint Distribution Service, CC Docket No. 86-210, 63 RR2d 398 at 403, par. 8.

5. NPRM at par. 3.

essentially fallow spectrum, and streamline the licensing process."⁶ Sprint agrees that these objectives are important. However, service will not be expedited if disparate regulatory classifications are established for similar services, or if regulatory classifications are determined based upon the identity of the licensee. It is important at the outset for the Commission to establish a policy of clear and consistent regulatory standards if the services to be provided over LMDS are to flourish.

That is not to say that the Commission does not have the discretion to evaluate particular service offerings and regulate each service offering in a different way. It may be, for example, that the Commission will determine that video services should be regulated differently from non-video services. Such distinctions can be justified. Similarly, the Commission may determine that some services should be subject to streamlined, non-dominant regulation, based upon its traditional criteria for making such determinations. However, as the Commission continues to evaluate and license entities to provide new service offerings, decisions about regulatory classification issues are and will continue to be critical factors in determining the success or possible failure of particular entities and service offerings. It is important that the Commission base its

6. Id.

regulatory classification decisions upon reasoned and articulated standards, taking into account the type of service, and how it will be offered to the public.

As the D.C. Circuit has recognized, "[a] particular system is a common carrier by virtue of its functions, rather than because it is declared to be so." National Association of Regulatory Commissioner v. FCC, 525 F.2d 630, 644 (D.C. Cir. 1976) ("NARUC I").⁷

The question the Commission needs to consider and decide, both for non-video LMDS services, and for other new service offerings, such as personal communications services ("PCS"), is what the scope of private or non-common carrier status will be, and how such distinctions will be justified on an overall basis for similar service offerings. Regulatory classifications should be made based upon reasoned decisions about the burdens, benefits and consequences of a particular regulatory approach.

7. In NARUC I, the Court upheld the Commission's decision to classify providers of Specialized Mobile Radio Services ("SMRS") as private/non-common carriers. Importantly, while the Court affirmed the Commission's decision, it also defined the Commission's discretion in setting regulatory classifications:

Further, we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so. [Emphasis supplied.]

The Commission also sought comment on the jurisdictional implications of allowing election by a local exchange carrier of non-common carrier status in providing LMDS services.⁸ As noted, Sprint does not believe entities should be allowed to elect into or out of common carrier status. Whatever jurisdictional issues exist with regard to common carrier status of LMDS licensees exist irrespective of whether or not the licensee is a LEC. Further, if the Commission determines that LMDS licensees are to be treated as private/non-common carriers, then there is ample legal precedent to support the Commission's pre-emption of States imposing common carrier status on those licensees.⁹

Finally, Sprint suggests the Commission needs to know more about the type of services that may be offered through LMDS before making a final determination regarding the regulatory classification of particular service offerings. For example, to the extent LMDS becomes a vehicle for non-video offerings, it may look very similar to PCS. Thus the final determination of regulatory status for non-video LMDS services may need to be structured similarly to whatever regulatory scheme the Commission establishes for PCS.

8. NPRM at par. 26.

9. See, e.g., NARUC I wherein the Court affirmed the Commission's decision to pre-empt the States with regard to treating SMR license holders as private carriers.

III. SERVICE AREAS

The Commission proposes to license LMDS by the 487 "Basic Trading Areas" ("BTAs") identified in the Rand McNally 1192 Commercial Atlas and Marketing Guide, 123rd edition. The Commission suggests that the BTAs are the appropriate service area for many of the same reasons as supported its proposal to use BTAs for Personal Communications Services ("PCS").¹⁰ For many of the same reasons that Sprint objected to the use of BTAs in the PCS docket and suggested that RSA/MSAs should be used instead, Sprint believes that LMDS should be licensed by MSA/RSAs.¹¹

The MSA/RSAs are smaller than the BTAs and thus more entities will have the resources necessary to enter and compete than with the larger BTAs. Smaller entities that apply for licenses to serve their local area of interest are more likely to introduce service quickly than will larger firms obtaining licenses for larger service areas. Thus, smaller service areas should lead to more rapid universal deployment of LMDS and "maximize the competitive strength of LMDS stations in order to provide as much competition in video distribution and telecommunications services

10. In Personal Communications Services, Gen. Docket No 90-314, Notice of Proposed Rulemaking and Tentative Decision, released August 14, 1992.

11. See, Comments of Sprint, Gen. Docket No. 90-314, filed November 9, 1992.

as possible."¹² Finally, smaller areas should produce broader participation that should in turn produce a greater degree of service innovation and competition.

IV. SERVICE OF MINIMUM AREAS AND/OR POPULATIONS

The Commission proposes that licensee shall be capable of providing service to at least 90% of the population residing within the service area within three years of the grant of the license.¹³ Sprint agrees that some build out requirements are necessary to ensure licensees do not squander scarce resources and to discourage entities that are not serious about providing LMDS from applying for a license. However, the Commission's proposed requirements are too onerous. These requirements, coupled with the fact that LMDS is literally in its infancy and the full range of services that may be offered through LMDS is largely unknown, may well deny many serious, but smaller entities, the opportunity to apply.

Rather, consistent with Sprint's position that the Commission should utilize the cellular MSA/RSA service areas, the Commission should adopt build out requirements similar to those imposed on cellular licensees; e.g., 75% of either population or geographic area within three years for MSAs and even less stringent service requirements for RSAs. This was the approach adopted by the Commission in 1984, a time when cellular was far

12. NPRM at par. 30.

13. NPRM at par. 32.

more mature than LMDS is today, in the cellular proceeding concerning licensee selection in markets other than the largest thirty.¹⁴

V. CROSS-OWNERSHIP

The Commission does not propose any cross-ownership restrictions unique to LMDS.¹⁵ Sprint agrees that there should be no restrictions on telephone common carriers providing video programming through LMDS services. While section 533 of the Cable Communications Policy Act of 1984,¹⁶ and Commission Rule 63.54(a), 47 C.F.R. Section 63.54(a) that implements the 1984 Act, prohibit a common carrier from providing video programming directly to subscribers in its telephone service area, this restriction does not bar a telephone common carrier from

14. In the Matter of Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, CC Docket No. 83-1096, Report and Order, 98 FCC 2d 175 (1984). While the Commission did not impose any specific build out requirements on RSAs, it noted that RSA license holders would still have to comply with Rule 22.903 of the Commission's rules requiring 39 dBu coverage to 75% of the total area. Report and Order at par. 68.

15. NPRM at par. 33.

16. P.L. 98-549, codified at 47 U.S.C. Section 533 (the "1984 Act").

providing video programming through LMDS in its service area. In adopting the 1984 Act, Congress' intent was:

... to codify current FCC rules concerning the provision of video programming over cable systems by common carriers,¹⁷[Emphasis added.]

Congress further defined "cable systems" as:

...a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment, this is designed to provide cable service....¹⁸

Congress and the Commission were concerned that LECs would utilize their monopoly position and control over the communications infrastructure in an anticompetitive manner in the cable market place. With LMDS the LECs will have no such monopoly power or control over facilities. Accordingly, no restrictions upon LEC ownership exist, nor should any be adopted.

The same conclusion cannot be reached with regard to the existing holder of the cable franchise. As the Commission itself points out:

...the recently-adopted Cable TV Consumer Protection and Competition Act of 1992, P.L. 102-385, Section 11, generally prohibits cable operators from holding a license for "multichannel multipoint distribution service" in their own franchise areas. Although LMDS is not the Multichannel Multipoint Distribution Service, the two services have many similarities, Accordingly, it appears that the intent of Congress to facilitate competition in the video distribution services would include a ban on cable ownership of LMDS licenses if used to distribute video programming.¹⁹

17. H. Rep. No. 98-934, 98th Cong. 2nd Sess., reprinted in U.S. Code Cong. & Ad. News 4655, 4693.

18. Id., at 4681.

19. NPRM at par. 34.

Sprint believes the Congressional intent is clear. Existing cable operators must be barred from holding LMDS licenses in their service territory. Even without this clearly expressed Congressional intent, Sprint believes such a bar desirable because it will stimulate robust competitive video programming distribution and thus further one of the Commission's stated goals in this proceeding.

VI. STRUCTURE OF 28 GHZ BAND

Sprint supports the proposed 2 GHz allocation of spectrum in the 28 GHz range for LMDS services and 1 GHz allocation per licensee. Services offered within the LMDS allocated spectrum will compete primarily, at least at the onset of service, with CATV services. To provide the greatest benefit to the public, in terms of competitive alternatives to CATV, sufficient bandwidth must be allocated to create equivalent services.

The CATV industry has announced 500 channel capabilities as the near term goal for CATV franchises. With the advent of fiber and video compression technology in CATV infrastructure thousands of video channels are possible. In comparison, even with 1 GHz of bandwidth, LMDS is only projected to provide 50 to 100 channels of video program delivery. Allocation of less than 1 GHz would limit the ability of LMDS to compete with CATV services, both now and in the future, thereby limiting the potential benefits the public should realize with increased CATV competition.

Further, the Commission should exclude satellite services from LMDS spectrum. The multicell, multipoint nature of LMDS will require careful management of the spectrum to avoid interference with adjacent cells and management of simultaneously provided services offered over the same spectrum. Sharing spectrum with satellite services tremendously complicates this matter and may create two levels of LMDS value: an unrestricted A license and a less valuable restricted B license.

VII. TECHNICAL STANDARDS

Sprint opposes the establishment of technical regulations and standards beyond those minimally necessary. The application of the existing technology is immature and still rapidly evolving. Any delineation of detailed standards, such as 20 MHz channelization, specification of polarization, differentiation between cells, or specification of analog/digital technology could have a serious detrimental effect on the evolution of LMDS technologies and the services offered via LMDS.

VIII. SELECTION OF LICENSEES/SETTLEMENTS AND TRANSFERS

The Commission proposes to use random selection to choose among any mutually exclusive LMDS applicants.²⁰ Sprint supports this proposal and believes it is the only realistic choice available.

20. NPRM at par. 36.

While competitive bidding might be desirable, Congress has not authorized such a process. Further, the third possibility, comparative hearings, are too time consuming to meet the Commission's goal of "making as many innovative, competitive services available to the public as quickly as possible, ..."21

However, Sprint does not support the Commission's proposal to prohibit settlements and to prohibit transfers of licenses until the system has been constructed and is serving the public.²² Sprint is not unsympathetic with the Commission's desire to discourage license applicants that have no intention to build, but hope "to profit from merely filing."²³ However, the Commission's proposed restrictions go too far. Sprint believes that the application and financial showing requirements proposed by the Commission should suffice to allay the Commission's fears in this regard.

IX. LICENSE TERM

Sprint disagrees with the Commission's proposed five year license term.²⁴ Even if the Commission agrees with Sprint's proposal to use the smaller MSA/RSAs rather than BTAs to define

21. Id.

22. NPRM at, respectively, pars. 38 and 39.

23. NPRM at par. 38.

24. NPRM at par. 39.

service areas, construction costs for any single serving area will be significant and a minimum ten year license term with a reasonable renewal expectancy must be provided.

IX. CONCLUSION

Sprint supports the Commission's proposal to redesignate the 28 GHz band fixed service allocation to LMDS to provide video and other communications services. However, in order to create robust competition to the existing cable service and to encourage the fullest development of the existing technology, Sprint urges the Commission to modify its proposal as hereinabove set forth.

Respectfully submitted,

SPRINT CORPORATION

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ITS ATTORNEYS

March 16, 1993

CERTIFICATE OF SERVICE

I, Melinda L. Mills, hereby certify that I have on this 16th day of March, 1993, sent via U.S. First Class Mail, postage prepaid, or Hand Delivery, a copy of the foregoing "Comments of Sprint" in CC Docket No. 92-297, filed this date with the Secretary, Federal Communications Commission, to the persons listed below.

ITS
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Melinda L. Mills